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VIRGINIA LAW REGISTER

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Mr. Justice Brewer.

Of all of the Justices of the Supreme Court of the United States Justice Brewer was probably the best known to the majority of Virginia lawyers. His address before the State Bar Association in the summer of 1906 will long be remembered not only for its strength and interest, but for the pleasant personality of the speaker. He impressed himself upon those who met him as a straightforward, plain thinking and fearlessly expressing man. Of dignified carriage and demeanour, his bearing was marked by courteous affability, and those who met him for the first time, in a very short while seemed to feel that the acquaintance was one of long standing.

More than any other Judge of the great tribunal of which he was a member he mingled with the people and addressed his countrymen from the platform upon matters concerning the general welfare. He did not hesitate to express vigorous opinions upon all the great questions of the day and with vigorous rhetoric, he lashed the abuses of legal processes and the chicanery of lawyers. Appeals on mere technicalities he insisted should never be granted, unless it was clear that injustice had been done. Firmly believing in the dignity of the bench, he nevertheless insisted that when a case was ended the courts were subject to the same criticism as other people.

As a judge he was painstaking, self-sustaining and firm in his opinion, which he never hesitated to express vigorously, whether he agreed or disagreed with the majority. Notably was this apparent in the Northern Securities case, in which, whilst concurring with the court in its decision, he dissented from the reasoning by which that decision was reached. In his opinion he said:

"Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of inter-State

> trade, the ruling should have been that the contracts there presented were unreasonable restraints of inter-State trade, and, as such, within the scope of the act. That act, as appears from its title, was levelled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable, and against public policy."

He was no friend of monoplies but he saw that the language used by the Court making the act apply to all combinations irrespective of their tendencies for good or evil

> "Might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation."

His death whilst the great questions involved in the Standard Oil and American Tobacco Company cases are pending is deeply to be regretted; for at no time than the present is more needed a broad, catholic mind, which can look beyond the mere present effect of a decision and do the right, regardless of popular clamour or demagogic appeal.

Justice Brewer's name will stand high upon the roll of the great judges who have made up the most august tribunal in the world.

Permanent Disability of Judges and Public Officials.

At present there are but seven justices upon the Supreme Court engaged in hearing cases. Justice Brewer's death and Justice Moody's illness have left the Court with only that number. It is not surprising, therefore that the Court has ordered a re-argument of the two cases above referred to. It is said by Justice Moody's friends that he will be able to resume his labours in the Fall, but there are various conflicting statements as to his condition and it has been suggested that a movement was

on foot to retire him on a pension by act of Congress, he being entitled neither by age nor length of service to the retiring allowance of a Supreme Court Justice.

Mr. Justice Moody's condition and that of one or two other distinguished public officials calls attention to the fact that there is no provision in our law providing for the permanent disability of a Judge or other high official. A Judge may become a hopeless lunatic, a senator a helpless paralytic, but the places must remain filled and yet practically vacant until death intervenes, in the one case, or a term expires in the other. Just what should be done is hard to say, but should not someway be provided to relieve a situation which might prove not only embarrassing but positively injurious.

The Lawyer's Duty and Responsibility.

Lawyers generally are not disposed to take the New York standard of ethics as their guide in the practise of their profession. The Bar which produced Howe and Hummel, and the Bench which tolerated them and others of their ilk for so long a time cannot expect to receive much consideration when questions of good conduct are under discussion.

It is gratifying, however, to see that Judge Holt in whose court Mr. Hartridge has been suing the mother of the wretched Thaw for a fee of some ninety odd thousand dollars, has instructed the District Attorney to examine Mr. Hartridge's conduct and requested the New York Bar Association to enquire into his methods of practise.

Mr. Hartridge had received what in this benighted part of the vineyard would have been considered an enormous fee. He wanted more and when suing, a bill of particulars was required, filed such an one as would have caused in our opinion a jackal to blush. We were under the impression that a lawyer's obligation to a client in a criminal case was to see to it that every legal right of the accused was observed, and that the case agains him should be properly presented, clearly proved and impartially decided. Beyond this no honest lawyer, remembering his oath and respecting his office and personality should ever go.

Hartridge, according to his own statement, spent thousands of dollars in the suppression of testimony and in work which only a detective of the lowest character would undertake. Evidently he saw no impropriety in his course, and if his statements as to what he did are true, his disbarment should follow as a matter of course. If not true he is a perjurer and should be punished as such.

To a practitioner raised in country environments or in the pure atmosphere of a high-toned bar, this man's conduct is inexplicable. Such as he bring discredit upon a noble profession and it is every lawyer's duty to see that such offenders should be debarred from practise.

The accusation that members of the bar are derelict in their duty as to exposing shysters, ambulance chasers and discreditable attorneys is one as to which a plea of *non vult* must too often be offered.

The flagrant cases the judges can handle. Are there not many, the Bar should investigate, expose and see to it that swift punishment follows the breach of the code of ethics we all profess to practise.

The legal profession is one of the most honorable of all pursuits, and such practises as those charged against Hartridge make all true and loyal members of the bar blush with shame. The harm that is done affects not only the clients who are overcharged and misrepresented, but falls heaviest upon the honorable members of the profession. For their sake, as well as that of the clients the lawyer is sworn to protect, there should be a thorough investigation of the Hartridge case.

Classes of Beneficiaries under Our Lord Campbell's Act.

In a recent issue of the LAW REGISTER (15 Va. Law Reg. 825) our readers were so fortunate as to have the views at some length of that learned teacher and peerless commentator of the law, Prof. C. A. Graves of the University of Virginia, upon many questions that have arisen under the Virginia statute giving a right of action for death by wrongful act, neglect or default. Whenever Professor Graves expresses his opinion upon

any mooted question of law (which we regret to say is far too infrequent) he never fails to "illuminate it," as was said of the great Chief Justice, and any predictions that he may make as to the outcome of undecided points carry great weight, and always receive careful consideration from the Bar, because of his unfailing accuracy. We refer to that part of the article in which he discusses the question which arises as to the disposition of the damages when the jury have failed to direct, as they might have done, in what proportions the damages awarded shall be distributed to the wife, husband, or child of the deceased whom he designates as the preferred class, or in the absence of this class, to the deceased's parents, brothers, and sisters whom he designates as the deferred class. His conclusion, as will be remembered, was that the distribution should be confined to the enumerated members of the preferred or deferred class, "so that the statute should be interpreted as if its language were as follows: 'To the wife, husband, and child in such proportions as the jury have directed, or if they have not directed, then [to wife, husband, and child] according to the statute of distributions;' and, if there be no wife, husband, or child, then 'To parents, brothers, and sisters, in such proportions as the jury have directed, or if they have not directed, [to parents, brothers, and sisters] according to the statute of distributions." In other words he says it was never intended, in any case, to allow relatives outside of the described classes to share with those enumerated in one or the other class of beneficiaries, because the amount received by such unnamed relative would then be free from all debts and liabilities of the deceased. And this view we feel sure has been generally accepted by most of the members of the Bar who have given the subject any thought, notwithstanding a decision to the contrary by the circuit court of the city of Richmond, reported in 10 VIRGINIA LAW REGISTER, page 62. And the debates of the General Assembly will show that such was the purpose of the act, which was passed after the appalling disaster at Jerry's Run on the Chesapeake and Ohio Railway, involving such great loss of life, for which there was no remedy under the common law. It seems absolutely unreasonable that the legislature could ever

have intended that so remote a relative of the deceased as the grandchild or a nephew, should receive and hold the damages recovered for the death of their kinsman free from liability for debts, especially as no legal and probably no moral obligation of support rests on so remote a relative. To our mind the very maxim expressio unius est exclusio alterius, if applied to such a case would be sufficient to exclude those outside of the enumerated classes. So that it seems consonant with reason that the legislature never intended that the enumerated members were to be ignored and the distribution to be made to those entitled under the statute of distributions. But so conclusive seems Professor Graves' reasoning, that we would have been content to let the matter rest where it was, had not his views received reinforcement by a recent decision of Judge Martin of the Court of Law and Chancery, of Norfolk, Va. The case referred to is that of the personal representative of Chas. Skinner *v.* N. & P. Traction Co., a suit for damages for causing the death of Skinner. Skinner left a wife and sister (who was the administratrix) but no father, mother or children. Before qualification of administratrix, the wife compromised with the company and executed a release. The company pleaded the general issue and a special plea in bar setting up the above facts. The plaintiff moved to reject the special plea which motion was overruled. On the trial defendant proved the material facts set up in the special plea, by the wife, who stated she was still satisfied with the settlement. The court instructed the jury that if they believed the facts set out in the special plea (reciting them in the instruction) that they must find for the defendant, which they did. It was decided that there being no mother or children of Skinner, his wife was the sole beneficiary under the Code and that her release was a bar to the action, brought after the release had been made. At the trial the plaintiff raised another question, i. e., that the wife at the time of the husband's death was living in adultery with another man and therefore under Code, § 2560, was barred from receiving any damages for his death. The court refused to allow evidence on this point to be introduced on the ground that the damages sought to be recovered were no part of *his* personal estate as to which he died intestate and therefore said section was not applicable.

It is to be regretted that the court delivered no written opinion in the case, but we are satisfied of the correctness of the decision, and cannot see how the court could have decided otherwise under § 2904. The statement above that "there being no mother, his wife was the sole beneficiary" will cause no confusion, because § 2904 expressly provides where there is a widowed mother that such member of the deferred class shall be allowed to come in with the member of the preferred class. We do not know whether any appeal is contemplated in this case, but feel confident that in any event Judge Martin's decision will be sustained.

The Pardoning Power.

The action of Governor Patterson of Tennessee in granting a full and unconditional pardon to Cooper, the slayer of Senator Carmack, after the Supreme Court had affirmed the conviction of the court below, has created intense feeling throughout the country, and subjected that executive to well-merited censure. Executive clemency as a general rule is only granted after newly-discovered facts, arising since the trial, have been thoroughly investigated, or in case of the illness of the accused, or where his guilt is merely technical and there are many extenuating circumstances. Governor Patterson, however, did not base his pardon on any of these things, but has set himself above the courts and the jury, has set aside their verdict, and overturned the judgments of the lower court and the Supreme Court of the state of Tennessee, without any showing, or attempt to show that they were corrupted or were conspiring to rob Colonel Cooper of his rights. We can conceive of no more flagrant abuse of the pardoning power than this case presents, and calls for speedy action on the part of the Legislature of that state to the end that the Governor may be shorn of this power, and the right to exercise it given to a board of pardons.

"Being thoroughly familiar with the record and having read all the testimony and testified to certain facts within my own knowledge," says Governor Patterson, "it is neither desirable nor necessary to delay action for petitions to be presented asking executive clemency. In my opinion neither of the defendants

is guilty, and they have not had a fair and impartial trial, but were convicted contrary to the law and the evidence."

We understand that Governor Patterson has a most unenviable record in his indiscriminate exercise of this power, and that during his tenure of office vast numbers of criminals, including many murderers, have been turned loose on the community. But the worst feature of the whole matter are the reasons the Governor gives for his action. He does not excuse or account for this pardon on any grounds which should appeal to the executive. It is granted by him because he was *first* a witness, whose testimony, if what he states is true, was discredited by the jury, the proper tribunal to pass upon the same, and *second* because he made himself a court of appeals superior to the court empowered by the Constitution to decide upon the record before them. We may not all agree as to the justice of the conviction. But that's another story, as Kipling would say. Its legality is unquestioned. The Governor would have been wiser to give no reasons. *Qui excuse s'accuse.*